Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Re	)	
	)	
Applications of the Ameritech Corporation,	)	
Transferor and SBC Communications, Inc.,	)	
Transferee, for Consent to Transfer of Control	)	CC Docket No. 98-141
Of Corporations Holding Commission Licenses	)	
And Lines Pursuant to Sections 214 and 310(d)	)	
Of the Communications Act and Parts 5, 22, 24,	)	
25, 63, 90, 95, and 101 of the Commission's	)	
Rules	)	
Application of GTE Corporation,	)	
Transferor, and the Bell Atlantic Corporation,	)	
Transferee, for Consent to Transfer of Control	)	CC Docket No. 98-184
Of Domestic and International Section 214	)	
And 310 Authorizations and Application to	)	
Transfer Control of a Submarine Cable	)	
Landing License	)	

COMMENTS OF THE PACE COALITION IN SUPPORT OF PETITION FOR DECLARATORY RULING

The Promoting Active Competition Everywhere ("PACE") Coalition,[1] through its undersigned counsel, responds to the Commission's Public Notice[2] seeking comment on the Petition for Declaratory Ruling ("*Merger Order Petition*") filed by thirty-seven competitive local exchange carriers ("CLECs") with respect to the continued application of obligations imposed in the SBC/Ameritech Merger Order and the Bell Atlantic/GTE Merger Order (hereinafter referred

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1 The PACE Coalition is comprised of competitive local exchange carriers that provide a variety of telecommunications services to businesses and residential consumers throughout the country. Each PACE Coalition carrier offers a form of bundled local exchange and long distance services, among other services, to residential and small business customers using the combination of network elements commonly referred to as the unbundled network element platform ("UNE-P").

2 *Wireline Competition Bureau Seeks Comments on Petition for Declaratory Ruling Regarding SBC/Ameritech and Bell Atlantic/GTE Merger Requirements,* CC Docket Nos. 98-141 and 98-184, Public Notice, DA 04-2974, released September 14, 2004.

to jointly as the "Merger Orders").[3] The PACE Coalition supports the petition and urges the Commission to promptly act to enforce the unbundling obligations that the Commission imposed on SBC Communications, Inc. ("SBC") and Verizon Communications, Inc. ("Verizon") in the Merger Orders as a condition of approval of their respective mergers with Ameritech and GTE.

In the Merger Orders, the Commission carved out two conditions that would cause either SBC or Verizon's unbundling obligations to sunset, and each condition requires a final, non-appealable decision regarding the implementation of section 251(c)(3) of the Communications Act of 1934, as amended ("the Act") to take effect. The attempts by SBC and Verizon to invoke the sunset provisions of their respective Merger Orders fail to take into account the ongoing, unbroken line of proceedings in the courts and at the Commission to implement the unbundling requirements of section 251(c)(3).

I. INTRODUCTION

The unbundling obligations incorporated into the SBC and Verizon Merger Orders were expressly designed to address serious concerns regarding whether the proposed mergers were in the public interest. Ultimately, the proposed mergers were found to pass the Commission's public interest standard *only* because they were expressly conditioned on public interest conditions,[4] and *only* after "assuming the applicants' ongoing compliance with these

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3 *Application of Ameritech Corp., Transferor, and SBC Communications, Inc. Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, FCC 99-279 (1999) ("*SBC/Ameritech Merger Order*"); *Application of GTE Corporation, Transferor, and the Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Memorandum and Opinion Order, 15 FCC Rcd 14032, FCC 00-221 (2000) (*Bell Atlantic/GTE Merger Order*).

4 *See SBC/Ameritech Merger Order* ¶ 62, ¶ 348; *Bell Atlantic/GTE Merger Order* ¶ 96, ¶246.

conditions."[5] Absent these conditions, the Commission found the mergers would "inevitably retard progress in opening local telecommunication markets."[6] SBC and Verizon voluntarily committed to be bound by these conditions - among them a commitment to continue to comply with their obligation to offer unbundled network elements ("UNEs") - in exchange for Commission approval of their pending mergers.[7] SBC and Verizon are now attempting to withdraw from their commitments by searching for some non-existent loophole in the Merger Orders.[8] The Commission must not let them achieve their objective.

If SBC and Verizon are allowed to unilaterally determine their UNE obligations, competition and consumer choices will suffer certain harm. At the time the Commission faced the proposed SBC/Ameritech and Bell Atlantic/GTE mergers, the unbundling rules were in flux.[9] It was known that Congress intended the ILECs' monopoly local networks to be opened to competition through *inter alia* Commission regulations assuring CLECs access to particular ILEC network elements. It was not known what those final Commission rules were or when they would finally be established. The Merger Conditions were expressly designed to protect CLECs until final unbundling rules which were no longer subject to judicial review could be

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5 *SBC/Ameritech Merger Order* ¶ 354; *Bell Atlantic/GTE Merger Order* ¶ 247.

6 *SBC/Ameritech Merger Order* ¶ 62. The *Bell Atlantic/GTE Merger Order,* ¶ 96, has nearly the exact same language. ("Accordingly, as described below, absent the supplemental conditions proposed by the Applicants, we would conclude that the proposed merger does not serve the public interest, convenience, or necessity because it would inevitably slow progress in opening local telecommunications markets to consumer-benefiting competition.")

7 *See SBC/Ameritech Merger Order,* Appendix C ¶ 53; *Bell Atlantic/GTE Merger Order,* Appendix D ¶ 39.

8 *See Merger Order Petition* at 7.

9 The initial unbundling rules were vacated and remanded by the Supreme Court in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), and the CLECs were awaiting the replacement regulations soon to be promulgated in the *UNE Remand Proceeding,* which were certain to be challenged again by various parties. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*").

established.[10] Sadly, over eight years after passage of the 1996 Act, we still do not have final, non-appealable unbundling rules in place. Recently, the Commission again recognized that unilateral changes in unbundling obligations by the BOCs in this uncertain regulatory environment would be highly disruptive and contrary to the public interest.[11] The Commission considered the risk to consumer welfare "too great to bear unheeded"[12] and as a result issued interim unbundling rules to govern CLEC/ILEC relationships until new permanent unbundling rules could be adopted. In this uncertain and changing regulatory and judicial environment, the Merger Conditions are as necessary as they were when they were originally placed on SBC and Verizon and must be enforced accordingly.

SBC and Verizon's unbundling obligations under the Merger Orders are unambiguous. SBC and Verizon agreed to continue to provide UNEs under the same terms and conditions as they did on January 24, 1999.[13] They agreed that this condition could be terminated *only* upon the occurrence of two very specific conditions: (1) on the date of a "final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided,"[14] or (2) "after the effective date of final and non-appealable Commission order" in the UNE remand proceeding.[15] Plainly, it is impossible for either of these termination

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10 *See SBC/Ameritech Merger Order* ¶ 394; *Bell Atlantic/GTE Merger Order* ¶ 316.

11 *See Unbundled Access to Network Elements, WC Docket No. 04-313, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338*, Order and Notice of Proposed Rulemaking, FCC 04-179 (released Aug. 20, 2004) ("*Interim Order*").

12 *Interim Order* ¶ 18.

13 *See SBC/Ameritech Merger Order*, Appendix C ¶ 53; *Bell Atlantic/GTE Merger Order*, Appendix D ¶ 39.

14 *See SBC/Ameritech Merger Order*, Appendix C ¶ 53; *Bell Atlantic/GTE Merger Order*, Appendix D ¶ 39.

15 *See SBC/Ameritech Merger Order*, Appendix C ¶ 53; *Bell Atlantic/GTE Merger Order*, Appendix D ¶ 39.

conditions to have occurred because they each require a final, non-appealable decision to have been made with respect to the ILECs' unbundling obligations under section 251(c)(3) of the Act. Unfortunately, the unbundling rules are just as uncertain today as they were when the Merger Orders were approved.

II. SBC AND VERIZON REMAIN BOUND BY THE MERGER CONDITIONS BECAUSE THE UNBUNDLING RULES ARE NOT FINAL

The Merger Conditions were designed to protect CLECs until their unbundling rights under the Commission's rules implementing section 251(c)(3) of the Act became final. In the SBC Merger Order, the Commission explained:

> In order to *reduce uncertainty* to competing carriers from litigation that may arise in response to the Commission's order in its UNE Remand proceeding, from now until the date on which the Commission's order in that proceeding, *and any subsequent proceedings*, become final and non-appealable, SBC and Ameritech will continue to make available to telecommunications carriers each UNE that was available under SBC's and Ameritech's interconnection agreements as of January 24, 1999, even after the expiration of existing interconnection agreements, unless the Commission removes an element from the list in the UNE Remand proceeding or a final and non-appealable judicial decision that determines SBC/Ameritech is not required to provide that UNE in all or a portion of its operating territory.[16]

The Commission recognized that even after rules were issued in the *UNE Remand* proceeding there would be no final unbundling rules for an unknown amount of time while legal appeals were pursued. Accordingly, the Commission filled the void with unbundling terms the CLECs could count on for planning purposes. What the Commission wished to avoid during this potential vacuum was the BOCs unilaterally deciding how to fill the empty space, leaving competing carriers paralyzed with uncertainty as to the fate of their access to UNEs.

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16 *SBC/Ameritech Merger Order* ¶ 394 (emphasis added). The *Bell Atlantic/GTE Merger Order* has similar language in all substantive respects but also references the Line Sharing Order. ("In order to reduce uncertainty to competing carriers from litigation that may arise in response to our orders in the UNE Remand and Line Sharing proceedings..."). *Bell Atlantic/GTE Merger Order* ¶ 316.

The Commission also anticipated that the unbundling proceedings could continue beyond the immediate outcome of the *UNE Remand Order* challenges and therefore extended the coverage of the Merger Orders unbundling obligations to "all subsequent proceedings." The Commission was correct and the *UNE Remand* rules led to "subsequent proceedings," i.e. the *Triennial Review Order* and *Triennial Review Order* remand proceeding that the Commission is currently engaged in.[17] The Merger Conditions were unquestionably crafted to ensure stability for the CLECs during a transitional time that continues to this day and to remain in effect until final unbundling rules are in place.

A. SBC and Verizon Remain Obligated to Comply with the Merger Conditions Because Final, Non-Appealable Section 251(c)(3) Unbundling Rules Have Not Been Achieved.

Since before 1999 when the Merger Conditions were adopted, the Commission's section 251(c)(3) unbundling rules have consisted of an unbroken line of Commission orders, leading to court appeals, and resulting in *vacatur* of the rules and remand back to the Commission.[18] The November 1999 *UNE Remand Order* continued the cycle begun in the Commission's August 1996 *Local Competition Order* by responding to the Supreme Court's

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17 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), corrected by Errata, 18 FCC Rcd 19020 (2003) ("*Triennial Review Order Errata*") *aff'd, rev'd, and vacated in part sub nom., United State Telecom. Ass'n v. F.C.C.*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *petitions for cert. filed,* 2004 WL 1475967, 1494922, 1494953 (U.S. June 30, 2004); *Unbundled Access To Network Elements,* WC Docket No. 04-313, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179 (released Aug. 20, 2004).

18 *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (vacating and remanding the unbundling rules in the Commission's first order implementing section 251(c)(3) of the Act, i.e. the *Local Competition Order*); *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*") (vacating and remanding the subsequent *UNE Remand Order* unbundling rules); and *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (vacating and remanding parts of the unbundling rules adopted in the *Triennial Review Order* on remand from *USTA I*).

January 1999 decision in *Iowa Utilities Board* directing the Commission to reevaluate the unbundling obligations of section 251 of the Telecommunications Act of 1996.[19] *USTA I* placed the unbundling rules in the *UNE Remand Order* in another "remand...to the Commission for consideration."[20] The subsequent *Triennial Review Order*, which was the result of the remand in *USTA I*, continuously references *USTA I* as its directive.[21] Once again, major portions of the Commission's unbundling rules were vacated on appeal in *USTA II*.[22] They are back on remand at the Commission. The Merger Conditions remain operative because the process of developing federal unbundling rules remains ongoing, canceling the possibility there could have been any final, non-appealable rules at any point in the past eight years.

SBC and Verizon contend that their Merger Orders unbundling obligations expired with *USTA I*,[23] even though this completely contradicts the position they have previously taken on the matter. In the *Triennial Review Order* appeals, the BOCs – including SBC and Verizon - asserted that *USTA I* did not result in a final decision regarding their unbundling obligations. They argued that the consolidated appeals of the Commission's *Triennial Review Order* should be transferred from the Eighth Circuit Court of Appeals to the same panel of the D.C. Circuit that decided *USTA I* because the *Triennial Review Order* unbundling rules were the direct result of the court's rejection of the Commission's unbundling rules in *USTA I*.[24] The

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19 *See UNE Remand Order*, 15 FCC Rcd at 3698, para. 1.

20 *USTA I*, 290 F.3d at 430.

21 *See Triennial Review Order*, 18 FCC Rcd 16978, *e.g.* ¶ 132 (claiming their approach is "consistent with the guidelines we have received from the D.C. Circuit"); *id.* ¶ 154 (explaining how "our new impairment standard will address the concerns voiced by the D.C. Circuit").

22 *See USTA II*, 359 F.3d at 594.

23 *See Petition for Declaratory Ruling* at 12.

24 *See Eschelon Telecom, Inc. v. FCC*, No. 03-3212, Joint Motion for Expedited Transfer (8th Cir. filed Sept.18, 2003).

BOCs called the *Triennial Review Order* proceeding nothing more than a "post-remand review"[25] and asserted that "(a)ll unbundling issues in this case must be evaluated first and foremost on whether they comply with the relevant federal court order, which is the USTA decision."[26] The Eighth Circuit agreed with the BOCs' reasoning, transferring the consolidated cases to the D.C. Circuit where they were decided by the same panel that decided *USTA I.*

Understandably, the Commission provided for the Merger Conditions to terminate upon the issuance of an unbundling order that is affirmed on appeal. This is consistent with the purpose of the Merger Conditions as discussed above. However, it is obvious this has never happened. The unbundling rules remain in limbo while the Commission works on yet another round of replacement rules. The only section 251(c)(3) unbundling order that is in effect today is the *Interim Order* and, as the name suggests, it is only temporary.[27] There simply is not, and never has been, a final and non-appealable Commission unbundling order.

III. CONCLUSION

For the foregoing reasons, the PACE Coalition urges the Commission to grant the CLEC Petition for Declaratory Ruling and act to enforce the Merger Conditions that SBC and Verizon committed to be bound by until the date of final, non-appealable section 251(c)(3) unbundling rules.

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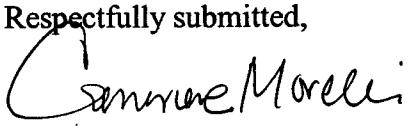
25 *Id.* at 2.

26 *Eschelon Telecom v. FCC*, No. 03-3212, Reply in Support of Joint Motion for Expedited Transfer, at 9 (8th Cir. filed on September 25, 2003).

27 *See Interim Order.* The *Interim Order* requires ILECs to continue providing unbundled access to mass market local switching, enterprise loops and dedicated transport while the Commission works to replace the vacated unbundling rules with ones consistent with *USTA II.*

Respectfully submitted,



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